Department of Law Monthly Report

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In This Issue

Collections & Support

The Collections Unit's primary achievement in a busy month was the completion and submission of the 2003 Permanent Fund Dividend garnishment to the Department of Revenue.

On the civil side, the Unit opened four and closed five civil cases and opened two and closed four OSHA cases. On the criminal side, the Unit sent 31 letters responding to inquiries from defendants and courts regarding payment agreements and other collection issues.

The Unit opened 130 criminal and 13 juvenile restitution cases for collection. Initial notices were sent to 236 recipients. Forty-three judgments were paid in full. Our office received payments totaling $65,181.09 toward criminal restitution judgments and payments totaling $11,054.09 toward juvenile restitution judgments this month. We requested 180 disbursement checks, and issued 213 checks to recipients.

Baker v. John: **Superior Court Rules for State in Child Support Case**

AAG Diane Wendlandt, with the assistance of AAG's Paul Lyle and Rob Nauheim, obtained a favorable decision from the Fairbanks superior court in *Baker v. John*. In two earlier appeals in this case, the Alaska Supreme Court held that a tribal court has member-based jurisdiction to resolve child custody disputes between parents in some circumstances. On remand, the superior court referred the custody issues to the tribal court. In the meantime, CSED continued to collect child support from the non-custodial parent, Anita John, under the state court's support order. Ms. John, however, claimed that the state court order was no longer valid because both custody and support were referred to the tribal court.

To resolve the issue, CSED filed a motion for clarification. In extensive briefing, Ms. John argued that child support is within the tribal court's member-based jurisdiction and that the tribal court's support orders must be recognized under the federal Full Faith and Credit for Child Support Orders Act, which requires recognition of orders issued in Indian country. We disagreed, providing a detailed analysis of both the child support and the Indian country issues.

The superior court ruled in favor of the State. The court found that it did not need to reach the Indian country issues because the tribal court had never issued a support order for these parents. Thus, the federal Full Faith and Credit Act was never triggered. The court further held that child support does not fall within the member-based jurisdiction of the tribal court because child support is not a dispute strictly between tribal members. Child support is part of a national system, subject to extensive federal regulation and state involvement. The tribal court in this case could not demonstrate that it met any of the federal requirements for operating a child support program, including issuance of support orders. The court found that to allow tribal support orders in this context would result in tribal direction of state officials in their enforcement of state law and in violation of federal requirements. This, the court concluded, would be contrary to the United States Supreme Court's decision in *Nevada v. Hicks.*

State, CSED v. Williams

The State prevailed in its motion for summary judgment in the *Alvin Williams* case. This case began as a simple paternity action to establish Alvin Williams as Woodrow Greist's father. Nelson Greist, the child's legal father, was previously determined not to be the child's biological father. Therefore, CSED filed a paternity complaint against Mr. Williams, and genetic testing confirmed that he is the biological father. Upon receipt of the test results, Ms. Hartnell filed a motion for summary judgment, asking the court to adjudicate Mr. Williams as the father. Mr. Williams opposed that motion, based on a "paternity by estoppel" argument, and filed a third party complaint against Mr. Greist. An evidentiary hearing was held on May 13, 2003.

Superior Court Judge Erlich rejected Mr. Williams' paternity by estoppel argument. His ruling focused on the fact that, shortly after Woodrow was born, Mr. Greist asked Mr. Williams if Mr. Williams was Woodrow's father. Although Mr. Williams did not respond to that question, the court found that he had knowledge that he might be Woodrow's father but chose to ignore the situation. Also, the court found that Mr. Williams was in a better financial situation to support Woodrow than Mr. Greist was. Thus, it was in the child's best interests to establish Mr. Williams as the child's father. Based on these findings, the judge ruled that Mr. Williams is Woodrow's father and owes him a duty of support.

This case is being handled by AAG Pamela Hartnell.

Commercial & Fair Business

Alaska Telephone Co., Bettles Telephone Co., North Country Telephone Co., RCA Docket Nos. U-02-86/103/104/105

A settlement agreement was reached between the Attorney General and three rural telephone companies on July 28, 2003, two days before the case was scheduled for hearing before the RCA. The settlement covers the revenue requirement, rate base, rate of return and a depreciation rate for these rural telephone companies.

These are all rural companies, exempt from competition under the Telecommunications Act of 1996. 47 U.S.C. § 251(f). All are subsidiaries of Alaska Power and Telephone (AP&T). Alaska Telephone Co. (ATC) service areas include numerous communities in southeast and interior Alaska (including Petersburg, Wrangell, Skagway, Haines, Craig, Tok and Tetlin). Bettles Telephone Co. (BTI) service areas are in interior Alaska (including Bettles and two other small communities), and North County Telephone Co. (NCT) service area includes two communities - Eagle and Eagle Village, on the Canadian border.

Under the settlement, ATC's requested rate increase was reduced 6.68%, BTI's requested rate increase was reduced 12.23%, and NCTI's requested rate increase was reduced 27.83%. All three telephone companies also agreed to reduce their requests rate of return from 12.08% to 11.06%.

AAG Steve DeVries represented the state in these cases.

HIPAA Compliance

AAG Elizabeth Hickerson has been working with the HIPAA compliance officer in the Department of Health and Social Services to ensure that the State is in compliance with HIPAA. The federal law (Health Insurance Portability and Accountability Act of 1996) requires that covered entities (health plans, health care clearinghouses and certain providers) protect privacy for all individually identifiable health information and security for electronic health information. Hot topics in this area include: use and disclosure of protected health information, de-identification of protected information, and parental access to minor's health information. AAG Hickerson is working with the department on developing complaint procedures related to potential violations of HIPAA by the State and giving advice on business associate and security agreements with entities that handle personal health information for the State.

Nursing Board Revokes CNA's License Based On Failure To Disclose Conviction

On July 9, 2003, the Board of Nursing adopted the hearing officer's proposed decision and revoked Sharon Mosbrucker's license as a certified nurse aide (CNA), based on her failure to disclose a 1995 conviction (forgery in the third degree) in her initial application for licensure in 1996 and in her 2000 renewal application. By failing to disclose her forgery conviction, the Division of Occupational Licensing alleged that Mosbrucker obtained her CNA license and her renewal certificate by fraud, deceit, or intentional misrepresentation, in violation of AS 08.68.334(1). The hearing officer determined that revocation was justified, based on prior cases involving similar facts and because Mosbrucker's testimony at the hearing, especially where she failed to acknowledge her criminal conviction, raised continuing concerns about her trustworthiness.

AAG Robert Auth represented the Division in this proceeding.

Nursing Board Fails To Discipline CNA For Hospital Incident

On July 9, 2003, the Board of Nursing adopted the hearing officer's proposed decision and imposed no discipline on certified nurse aide (CNA) Theadrata Williams. The Division of Occupational Licensing had alleged that Williams slapped a patient in the face at Providence Hospital and therefore abused a client, in violation of AS 08.68.334(b)(7).

At the hearing, two eyewitnesses (a registered nurse and a personal care technician) testified that Williams slapped the patient after the patient intentionally spit out his medication. Williams was fired as a result of this incident. Not giving weight to Williams' possible motive to avoid discipline, as well as his prior inconsistent statements, the hearing officer determined that Williams' explanation that he merely "muffled" the patient's mouth with a cupped hand was more credible than the eyewitness testimony. The hearing officer, however, acknowledged it was a "close call." An equally divided Board rejected the Division's subsequent motion for reconsideration.

AAG Robert Auth represented the Division in this proceeding.

Human Services

***Jerry C. v. State, Department of Health & Social Services*, MOJ #1137, July 9, 2003**

The Alaska Supreme Court decided two child in need cases by unpublished decisions this month. *Jerry C.* was a termination of parental rights proceeding involving an Indian child. The trial was held in Bethel before a master, an unusual proceeding but one allowed by the CINA court rules. The parent relied on *C.J. v. State, Department of Health & Social Services*, 18 P.3d 1214 (Alaska 2001), to challenge the adequacy of expert testimony for Indian Child Welfare Act (ICWA) standards, by noting that the expert's knowledge of the case came primarily from agency documents rather than from actual contact with family members. The court rejected the argument, finding that, despite the source of the expert's information about the family, her testimony was sufficiently informed and fact specific to meet the ICWA termination requirements.

The parent also mounted a challenge based on *J.J. v. State, Department of Health & Social Services*, 38 P.3d 7 (Alaska 2001). That case involved a parent who, by the time of trial, had demonstrated nearly a year of sobriety. The supreme court ruled that in the circumstances specific to that family, the superior court should have allowed the parent more time to attempt reunification with her children. The court in *Jerry C.* rejected a similar argument, and set out factors the courts should consider (including testimony regarding issues other than the parent's substance abuse, the nature of the child's placement situation at the time of the termination trial, and the length of the parent's demonstrated sobriety) regarding such an argument.

We felt these holdings justified a published opinion rather than an MOJ, and requested that the court publish the opinion. Unfortunately, the court declined our request.

AAG Christi Pavia handled the case for the state.

***Jenny W. v. State, Dept. of Health & Social Services*, MOJ #1136, July 2, 2003**

Jenny W. was an appeal of an order terminating parental rights of the mother. The mother's only argument on appeal was that it was not in the children's best interests to terminate her parental rights. The Alaska Supreme Court found that there was sufficient evidence to support this finding.

The mother also argued that the superior court should have ordered a guardianship in order to preserve contact between her and the children. The superior court had found that anything short of termination of parental rights was not in the children's best interests because of the mother's manipulating, intimidating behavior towards the foster parents. The superior court concluded that any benefit of a guardianship, such as continued child support and continued contact with the mother, was more than outweighed by the disruption that such contact would cause to the children. Based on the record, the supreme court could not say that failing to order a guardianship was clearly erroneous.

AAG Jan Rutherdale handled the case for the state.

Labor & State Affairs

Department of Education awarded summary judgment in correspondence school funding case

Four years of litigation over funding of a correspondence school in Anchorage has come to an end. Because correspondence schools receive 80 percent of the foundation formula funding that other schools receive, Family Partnership Charter School has for years argued that its home-school curriculum is not a correspondence school. Although Family Partnership had convinced a hearing officer back in 2000 that it was not a correspondence school, the Board adopted a new regulation that defined correspondence schools to be any school that did not have sufficient face-to-face contact with a real live teacher. Family Partnership lost at a second hearing in 2002, and then brought this declaratory judgment action in which it asked to have the regulation declared invalid.
Judge Sen Tan, applying the *Kelly v. Zamarello* test, found that the regulation was valid because the department's definition "is reasonable and not arbitrary," and he gave "deference to the DOE's determination," which "involves a specialized educational subject matter." Family Partnership has elected not to appeal.

AAG Neil Slotnick represented the Department of Education and Early Development in this case.

Legislation & Regulations

Legislation Proposals Collected

During July 2003, the Legislation and Regulations Section collected, for the governor's consideration, proposals for legislation to introduce in the upcoming session of the legislature. The section also advised the Department of Health and Social Services in preparing emergency regulations for adoption with respect to the state low-income heating assistance program, so that seniors may receive money under the new Alaska Senior Assistance Program without jeopardizing their eligibility for heating assistance.

The section wrapped up most of its work on this season's regulations from the Board of Fisheries and Board of Game. Additionally, reviews were completed for regulations with respect to occupational licensing, hazardous waste, and administrative complaint procedures mandated by the federal Help America Vote Act.

The section began preparations to give training classes in regulations work for new agency staff. Classes were scheduled for September 17 in Anchorage, September 19 in Fairbanks, and September 30 in Juneau. Sessions for assistant attorneys general were scheduled for

September 18 in Anchorage and September 24 in Juneau. The Alaska Bar Association has approved the attorney sessions in Anchorage and Juneau for 2.5 hours of CLE credit.

Natural Resources

Roadless Case Settled

On July 22, 2003, U.S. District Court Judge Singleton granted the motion for voluntary dismissal without prejudice of the State's case against the United States seeking to invalidate the Forest Service's Roadless Rule, *State of Alaska v. United States Department of Agriculture*. The dismissal was the result of a settlement agreement entered between the State, the United States and the intervening plaintiffs. The agreement required the United States to publish an Advance Notice of Proposed Rulemaking to exempt both the Tongass and Chugach National Forests from application of the Roadless Rule, and to publish a proposed temporary regulation to exempt the Tongass National Forest until completion of the rulemaking process for any permanent amendments to the Roadless Rule. Both notices were published in the Federal Register in July.

Elizabeth Barry represents the state in this matter.

Fishing Vessel Seizure in Bristol Bay

A commercial fishing vessel was seized in Bristol Bay because the operator did not have a limited entry permit. The operator did have his brother's permit, but his brother was still working in the Lower 48. The state filed a civil forfeiture action against the vessel and the operator agreed to pay the state $5,000 in lieu of forfeiture, plus the costs of seizing and holding the vessel. He also pled guilty to one criminal count of fishing without a limited entry permit and was sentenced to a one year loss of commercial fishing privileges and a fine of $10,000 with $5,000 suspended.

State Files Petition for Hearing in Halibut Permit Case

On July 31, the state filed a petition for hearing, asking the Alaska Supreme Court to review a Court of Appeals decision on the authority of the Commercial Fisheries Entry Commission (CFEC) to require an "interim-use permit" for commercial halibut fishing. The case arises from the prosecution of three commercial fishermen who caught halibut outside of Alaska waters, then brought the fish into state waters for landing, delivery and sale without holding a permit from the CFEC. In the petition to the supreme court, the state has argued that the court of appeals has construed the CFEC's authority to issue "interim-use permits" too narrowly, unnecessarily impairing the state's ability to manage commercial fisheries. If the court grants the petition, the issues will be fully briefed for the court.

AAG Jon Goltz is representing the State.

Oil, Gas, & Mining

Challenge to Drilling Permits Rejected

The superior court in Anchorage affirmed decisions by the Alaska Oil and Gas Conservation Commission to issue BP Exploration (Alaska) Inc. several permits to drill wells in the offshore Northstar Project. Greenpeace, Inc., had challenged the permits on several procedural and substantive grounds, including asserted noncompliance with the Alaska Coastal Management Program. Greenpeace has since appealed to the Alaska Supreme Court.

AAG Rob Mintz represented the Commission in this case.

Opinions, Appeals & Ethics

The new Opinions, Appeals & Ethics Section held a day long organizational meeting in June to discuss the various functions of the section and how to best manage them. The new section is located in the Office of the Attorney General and made of up six attorneys (two in Juneau, two in Anchorage, and two in Fairbanks).

The section is responsible for a variety of functions including review and recommendations on the appeal of civil cases, more coordination with the Office of Special Prosecutions and Appeals, review of draft appellate briefs, assistance with appellate briefing, moot courts, recommendations for *amicus* sign-ons, review of draft attorney general opinions and letters, preparation of certain opinions, Indian law issues, Executive Branch Ethics, and professional ethics issues. The section will also be providing the Attorney General with assistance and advice regarding the states public funds and public finance issues, and legal advice to the Governor's Office. We plan to update and revise the Civil Appeals Policy to reflect the role of the new section in the appeals process. The section has begun a more formal process for review and recommendations on possible appeals and is assisting on several appeals and opinion matters.

Torts & Workers' Compensation

Alaska Supreme Court Rules on *Kiokun v. State*

On July 25, 2003, the Alaska Supreme Court delivered its opinion in *Kiokun v. State*, a lawsuit that involved three members of the Olrun family who froze to death on the Denali Highway in January 1995. The plaintiffs sued alleging that the Department of Public Safety was liable for failure to initiate a search and rescue earlier than it was initiated. A jury trial in Bethel resulted in a verdict finding that the Department of Public Safety was 51% liable (and two of the decedents were 49% comparatively liable). Both parties appealed.

The supreme court reversed the judgment in favor of the plaintiffs and ordered judgment entered in favor of the State. The court found that the trooper decision when to initiate a search and rescue is an immune discretionary function. The court stated that "...the evaluation of weather conditions and resource availability is better left to the immediate discretion and expertise of the Department of Public Safety than evaluated in retrospect by the courts."

AAG's Venable Vermont and Dave Jones represented the State at trial; AAG Vermont handled the appellate briefing with assistance from former AAG Gary Guarino on the many tort reform issues that were raised in the damages case (although not decided by the court based upon the court's finding that the State was immune).

Transportation

Supreme Court Issues Favorable Decision in Quality Asphalt Paving

Department of Transportation and Public Facilities terminated a contract to widen the Chena Hot Springs Road under the contract's termination for convenience clause. The contractor claimed entitlement to $4,577,215 as a result of the termination. After a very lengthy hearing in 1998, the commissioner of the DOTPF awarded $1,945,857 to the contractor, plus prejudgment interest. The contractor appealed the commissioner's decision to the superior court; the state cross-appealed aspects of the agency decision. In 2001, the superior court vacated the prejudgment interest

award but affirmed the commissioner's decision in all other respects. The Alaska Supreme Court has now affirmed the superior court decision.

AAG's Paul Lyle and John Athens represented DOTPF.

Superior Court Issues Right of Way Decision

A landowner placed outdoor advertising and other encroachments in a state highway easement. Under state law, outdoor advertising cannot be placed in the easement. Landowners can obtain permits in certain circumstances to place other encroachments in the easement. The landowner contested these laws. The landowner also alleged that DOTPF regulations unconstitutionally required payment from the owner of an underlying fee interest for encroachments placed in an easement created by Public Land Order (PLO) 1613.

The superior court ruled that the state can ban outdoor advertising from the easement and that the state can require permits to place other encroachments in the easement. The court ruled that the landowner owned the underlying fee. Because the landowner owned the underlying fee, the court ruled the state could not charge more than an administrative fee for the issuance of a permit to place encroachments in the easement.

AAG Jim Cantor represented the state in this case.

Jury Awards Damages in *Markey* Case

Juneau residents lost their home to a landslide induced by heavy rains. The residents blamed DOTPF for changing the flow of water when it rehabilitated a road. DOTPF believed the residents changed the flow of water when they constructed a foundation. In the days leading up to trial, the residents abandoned theories of liability based on DOTPF's alleged negligence, and proceeded to trial on theories of liability based on inverse condemnation (the taking of private property for public use). The jury found DOTPF liable and awarded approximately $900,000 to the residents to cover various expenses and to allow them to rebuild their home.

Former AAG Bill Cummings represented DOTPF in this case.

Criminal Division

BARROW

Ned Edwardsen, an eighteen-year-old with no prior record was sentenced to twenty-eight months to serve plus additional suspended time for a string of burglaries, theft, eluding police, and violating bail conditions.

After a seven-day jury trial, Dusan “Danny” Boceski was convicted of third-degree misconduct involving controlled substances for selling cocaine. Recently, while awaiting trial, Boceski was arrested after police found him with more cocaine in his possession.

BETHEL

Sam Snyder was convicted of sexual assault in the second degree after a jury trial. Another sexual assault trial of a different defendant resulted in a hung jury.

In a third jury trial, Robert Carleson was convicted of two counts of assault in the third degree, failure to stop at the direction of a police officer in the first degree, criminal mischief in the third degree, DUI, refusal, and driving without an operator’s license. There is currently a motion to set aside verdict based upon juror misconduct pending.

In the grand jury, two men were indicted for sexual abuse of a minor, six other men were indicted for sexual assault, two men were

indicted for felony drunk driving, two women were indicted for felony assault, two men were indicted for other felony driving offenses.

FAIRBANKS

Senior felony attorney and former Superior Court Judge Jay Hodges retired this month from the Fairbanks office. His legal knowledge, experience, and enthusiasm for prosecuting will be sorely missed.

ADA Corinne Vorenkamp received a guilty verdict in less than two hours in a manslaughter case. The defendant was convicted for the death of a passenger when he ran his truck into a lake while drunk. The defendant knew at the time that he did not have working brakes.

Two military men were indicted for the near fatal beating of a fellow soldier at a local nightspot. The victim was beaten and kicked to unconsciousness by the two defendants. In another case, a man was indicted for the stabbing death of a taxicab driver and theft of his cab. There was evidence that he had been planning this for a period of time, and may have previously attempted to attack another cab driver.

This was a bad month for cooks. Two people were charged with assaults over bad meals. In one case, the victim was hit over the head with a still full cooking pot; in the other the victim was stabbed with a fork at the table.

ADA Dave Burglin had the most entertaining trial of the month. This was a garden-variety drunk driving case with a solid Datamaster reading, until the defendant, a self-proclaimed witch, produced three members of her coven to testify that she had not been drinking for many hours prior to the test, and that result could not possibly be accurate. Among other things, the matriarch of the coven testified that part of their witches' code included the fact that "We are all in each other's care." Over the defense's objection, Dave had those words blown up on a huge poster during his closing and relied on that to prove their motivation to lie. Dave also intoned the words to Jimmy Buffet's hit song, "That's my story and I'm sticking to it," which contained some surprisingly apt examples of the kind of excuses offered during the trial. In spite of the magical gestures of those in attendance, the jury convicted.

KETCHIKAN

A Ketchikan jury convicted William Marshall of attempted murder in the first degree. Marshall pointed his rifle at a friend and shot three times. However, no bullets were actually fired. According to Robert Shem, the safety on the rifle was still on. Marshall then tried to club the victim in the head with the rifle. When asked if he was hurt, Marshall replied that he was hurt that his gun did not fire. When he asked the police what the charges were going to be, and was told they had not decided yet, Marshall replied that the charges should be attempted murder.

A Ketchikan jury found Christopher Booth not guilty of assault in the third degree. While unconscious on ground, the victim was kicked numerous times in the head, which the defense conceded. This occurred at a drinking party where the victim's brother was also severely injured by being kicked in the head and having his eye gouged out. About the only person at the party who was not drinking testified that she saw Booth kick the victim in the head many times. However, no one else saw Booth or anyone else kick the victim.

At a grand jury, a man was indicted for sexual abuse of minor in the first degree and second degree for sexual abusing two six year old girls who were at his house watching television with him while their older sisters and cousins were in a back room cleaning. Two defendants were indicted for felony drunk driving; another person was indicted for felony eluding; and another

person was indicted for vehicle theft in the first degree for stealing a boat.

KODIAK

A Kodiak man was convicted of sexual assault in the first degree and sexual assault in the second degree following a four-day jury trial. Sentencing has been set for October.

A Kodiak woman pled guilty to class B felony scheme to defraud following an investigation by the Department of Labor into her claims for unemployment insurance from January 1999 through September 2002. A September sentencing date has been set for this defendant who also faces possible deportation.

The July grand jury indicted eleven defendants on charges including misconduct involving a controlled substance, assault, forgery and theft.

KOTZEBUE

A Point Hope man pled no contest to sexual abuse of minor in the second degree and sentencing is set for September. Another Point Hope man pled to assault in the third degree after threatening his girlfriend and then firing his .22 magnum rifle near her; sentencing is set for October. A man from Deering has pled no contest to one count of sexual abuse of a minor in the second degree; sentencing is set for August.

NOME

Several new cases came out of the village of Teller in July. Frank D. Lee, a recidivist sex offender, was arrested and charged with sexual assault in the first degree after a woman reported that she was assaulted by Lee at an all-night drinking party. In an unrelated incident, a Teller man was arrested for stabbing two people and threatening two others with a knife. In Shishmaref, village police responding to a domestic call were confronted by a man with a shotgun threatening to kill them. As the police wrestled with the man, his girlfriend picked up the shotgun and tried to shoot the officers. Fortunately, the gun did not go off. Both the man and the woman were arrested on a variety of charges including assault on the third degree and attempted murder. In another case, the troopers seized a boat and a four-wheeler used in the importation of four cases of alcohol into Elim. In addition, four young men were taken into custody in that case. The same week, the forfeiture of two snowmobiles, in separate cases, was completed as part of the sentences in alcohol importation cases.

OSPA
(Office of Special Prosecutions & Appeals)

Personnel News

Liz Vazquez left the Welfare Fraud Prosecutor position this month after nine years and joins the Department of Health and Social Services. Special Prosecutions welcomes Maurice McClure as the new Welfare Fraud prosecutor. Maurice brings with her many years of litigation and prosecution experience and joins many of her old friends in OSPA where she has filled the role of Welfare Fraud Prosecutor before.

After four months as the acting supervisor, environmental crimes prosecutor Kevin Burke was officially promoted to be the white-collar prosecutor and chief of special prosecutions.

Prosecution News

Retrial results in guilty verdict. Clarence Dowl's 1999 conviction for violating a protective order was overturned by the court of appeals due to a jury instruction on *mens rea* that was inconsistent with the *Strane* decision. Andrea Russell retried the case and the jury returned a

guilty verdict after only ten minutes of deliberation.

Chilton convicted of criminal non-support. Brian Chilton, who owes over $45,000 in child support, pled no-contest in Juneau district court to one consolidated count of criminal non-support, was sentenced to suspended jail and fines, ordered to find gainful employment, and ordered to pay back child support on a rigorous schedule.

Petitions & Briefs of Interest

Abandoned property – reasonable expectation of privacy. The state argues to the Alaska Supreme Court that a person who attempts to conceal an object by hiding it must have a reasonable expectation of privacy in the place where the object is hidden, otherwise the object should be deemed abandoned. This case involves a defendant who shoved tissue-wrapped bundles of crack cocaine under the locked door of a closet at a motel; the defendant was neither a guest nor an invitee of a guest at the motel. *State v. Young,* S-11155.

Heat-of-passion defense. The state argues in a petition to the Alaska Supreme Court that the court of appeals erred in holding in *Dandova v. State*, 73 P.2d 325 (Alaska App. 2003), that the defense of heat of passion is available to a defendant charged with attempted murder. The state argues that the decision conflicts with the language of AS 11.41.115(a), which allows the defense only in certain prosecutions for first- and second-degree murder, as well as with the legislature's intent and the legislative history of the statute. *State v. Dandova*, S-11134.

Sex-offender registration – due process and privacy. The state argues to the Ninth Circuit that Alaska's sex-offender-registration law does not violate the due process or privacy rights of convicted sex offenders. First, a convicted sex offender has already received the full panoply of procedural rights that attend a criminal prosecution and is entitled to no further procedural due process. Second, sex-offender registration affects no fundamental rights and does not arbitrarily affect any non-fundamental rights; thus, there is no substantive due-process violation. Finally, the state's interest in protecting the public from recidivist sex offenders outweighs whatever privacy rights registered sex offenders might have in the information posted on the registry web site. *Doe v. Tandeske,* No. 99-35845.

Peremptory challenge; late exercise. The state argues to the Alaska Court of Appeals that a judge correctly allowed the state to exercise a peremptory challenge after the jury had been selected but before it was sworn. This occurred when a juror submitted a letter stating his unequivocal bias against the state, even though the juror claimed the letter was written in anger at having to perform jury duty. *Cook v. State*, A-7947.

Restitution; lost wages and defendant's ability to pay. The state argues to the court of appeals that an unemployed victim sustained a "loss of income" within the meaning of AS 12.55.045(d) because he could not do the job that he was scheduled to start due to the injuries he sustained at the hands of the defendant. The state also argues that a restitution judgment would not bankrupt the defendant because federal and state exemption laws limit the rate at which restitution may be collected from a person. *Bermudez v. State*, A-8445.

Statute and Rule Interpretations

DWI expanded look-back period upheld. The court of appeals held that all prior DWIs could be counted for purposes of calculating the mandatory minimum sentences for both

felony and misdemeanor DWIs. The legislature changed the law in 2001 to remove a limit which previously existed and had prevented priors that were older than ten years from being counted. *Ault v. State*, Op. No. 1888 (Alaska App., July 18, 2003).

Theft of services under AS 11.46.200(a)(1). In a case involving theft-of-cable-television services, the court of appeals interpreted theft of services under AS 11.46.200(a)(1) as not requiring the state to prove that the defendant actually watched the cable television programming, but only that he had access to the programming. *Cruz-Reyes v. State*, Op. No. 1891 (Alaska App., July 25, 2003).